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SUPREME COURT, U.S.
AUG 24 2010

No. 09-1067

IN THE

Supreme Court of the United States

LAURIE D. MCFADIN, D/B/A TWO BAR WEST; STACY L. MCFADIN, D/B/A TWO BAR WEST

v.

LYNN GERBER, D/B/A FOXY ROXY'S, D/B/A ETERNAL PERSPECTIVE HANDBAGS; WILLIAM GERBER, II, D/B/A FOXY ROXY'S, D/B/A ETERNAL PERSPECTIVE HANDBAGS; CONNIE GRENEMYER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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I. There is a Recognized Circuit Split Regarding the Application of the Calder "Effects" Test

Despite contrary opinions from the United States courts of appeal, Respondent's brief alleges that there is no circuit split in the instant case. Respondent's assertion is directly contradicted by cases from several circuits which expressly acknowledge the split.[1] For example, in *United States v. Swiss American Bank, Ltd.*, the First Circuit noted that "several circuits do not appear to agree as to how to read *Calder*."[2]

The split is also evident from recent rulings of the United States courts of appeal. The circuits do not agree whether, at a minimum, harm needs to be aimed at the forum itself or simply at a known forum resident. For example, in *Brayton Purcell LLP v. Recordon & Recordon*,[3] the Ninth Circuit considered a case of "willful copyright infringement targeted at [plaintiff], which [defendant] knew to be a resident of the Forum."[4] Despite the fact that the defendant did no business in the plaintiff's forum, the Ninth Circuit held that the plaintiff had "satisfied the 'purposeful

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1 *See Revell v. Lidov*, 317 F.3d 467, 473 n.41 (5th Cir. 2002); *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 624 n.7 (1st Cir. 2001); *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 261-264 (3d Cir. 1998); *Silver v. Brown*, No. 10-2005, 2010 U.S. App. LEXIS 12090, at *21 (10th Cir. June 14, 2010).

2 *Swiss Am. Bank*, 274 F.3d at 624 n.7.

3 606 F.3d 1124 (9th Cir. 2010). While *Recordon* was a dispute between two California residents, the defendant's venue argument required a personal jurisdiction analysis among the different California venues. *Id.* at 5 n.3.

4 *Id.* at 10.

direction' prong for specific personal jurisdiction" by causing harm to the known forum resident.[5]

The Tenth Circuit reached a similar conclusion in *Arocho v. Nafziger*.[6] *Arocho* involved a complaint brought by a Colorado prisoner who claimed the Washington DC based Federal Bureau of Prisons Director, Harley G. Lappin, had violated his civil rights by refusing to authorize a recommended treatment for Hepatitis C.[7] Despite no harm aimed specifically at the state of Colorado, the court based the requisite "purposeful direction" on Lappin's knowledge that "the brunt of the injury would be felt in Colorado."[8]

Conversely, in the case at bar, the Fifth Circuit denied personal jurisdiction on the basis that "'[f]orseeable injury alone is not sufficient to confer specific jurisdiction.'"[9] Thus, despite the fact that Grenemyer knew of the Plaintiffs' Texas residence and knew that Plaintiffs would suffer injury in Texas, the Fifth Circuit held that the exercise of personal jurisdiction was inappropriate because "the actions of selling allegedly infringing handbags are not directed toward Texas in any manner."[10]

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5 *Id.* at 12, 17.

6 No. 09-1095, 2010 U.S. App. LEXIS 4200, at *18-*19 (10th Cir. Mar. 1, 2010).

7 *Id.* at *1-*2, *7.

8 *Id.* at *18.

9 *McFadin v. Gerber*, 587 F.3d 753, 762 (5th Cir. 2009)(App. 11a)(quoting *Wein Air Ak., Inc. v. Brandt*, 195 F.3d 208, 212 (5th Cir. 1999)).

10 *Id.* at 761-62. *See also, Clemens v. McNamee*, No. 09-20625, 2010 U.S. App. LEXIS 16718, at *13-*34 (5th Cir. Aug. 12, 2010).

The "forum-focused" approach followed by the Fifth Circuit in the instant case can be traced back to the Third Circuit case of *Imo Industries, Inc. v. Kiekert AG.*[11] *Imo* first set forth the explicit requirement that a defendant "expressly aim[] his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity."[12] The *Imo* approach has been followed by the First,[13] Fourth,[14] Sixth[15] and recently Eighth[16] Circuits. Some state courts have also adopted a geographical targeting test.[17]

Viewing the requirements of the different circuits side-by-side, the circuit split is evident. The broad position expressed in *Janmark Inc. v. Reidy,*[18] that "there can be no serious doubt after *Calder* that the state in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor"[19] cannot be reconciled with *Imo*'s limited reading of *Calder*. Based on this deeply entrenched circuit split, this issue is ripe for Supreme Court review.

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11 155 F.3d 254 (3d Cir. 1998).

12 *Id.* at 265-66.

13 *Swiss Am. Bank, Ltd.*, 274 F.3d at 624.

14 *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 398 n.7 (4th Cir. 2003)(quoting the three-part standard set forth in *Imo*, 155 F.3d at 265-66).

15 *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1120 (6th Cir. 1994).

16 *Johnson v. Arden*, ___ F.3d ___, No. 09-2601, 2010 U.S. App. LEXIS 16116, at *30 (8th Cir. Aug. 4, 2010)("We therefore construe the *Calder* effects test narrowly, and hold that, absent additional contacts, mere effects in the forum state are insufficient to confer personal jurisdiction.").

17 *See Also, Griffis v. Luban*, 646 N.W.2d 527, 535 n.3 (Minn. 2002); *Pavlovich v. Super. Ct.*, 58 P.3d 2, 8 10, 8 n.1 (Cal. 2002).

18 132 F.3d 1200 (7th Cir. 1997).

19 *Id.* at 1202.

II. Respondent Improperly Attempts to Limit the Scope of Supreme Court Rule 10

Supreme Court Rule 10 sets forth the "character of the reasons the Court considers" in determining whether to grant certiorari. Specifically, Rule 10(a) provides that the Court will consider whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."[20] Rule 10(a) is the source of the so-called "circuit split" basis for granting certiorari.

Additionally, Rule 10(c) provides that the Court will consider certiorari where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."[21] Rule 10(c) is the source of the "important federal question" basis for granting certiorari.

Neither the "circuit split" nor the "important federal question" bases for certiorari are exclusive. Rule 10 also provides that the reasons listed for granting certiorari are "neither controlling nor fully measuring the Court's discretion."[22]

Nevertheless, Respondent's brief attempts to limit the scope of Supreme Court Rule 10 by claiming that it does *not* constitute a circuit split or conflict when

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20 SUP. CT. R. 10
21 *Id.*
22 *Id.*

"different courts . . . interpret various legal rules and principles differently."[23] Respondent has no basis for this limited interpretation of Rule 10.

Moreover, Respondent ignores Rule 10(c) which provides that the Court may grant certiorari to address an important federal question. Considering the number of cases regarding personal jurisdiction that the Court has considered throughout the years and the constitutional nature of the inquiry, personal jurisdiction is an important federal question.

III. Respondent's Attempt to Argue the Merits of the Case is Premature

The purpose of a brief in opposition to a petition for a writ of certiorari is to present arguments for denying the petition.[24] A brief in opposition is not the appropriate time to argue the merits of the case. Nevertheless, Respondent devotes a significant portion of her brief to rehashing the rulings below of the Fifth Circuit, district court, and magistrate judge.[25] Respondent even goes so far as to address the issue of transfer of venue which was not at issue before the Fifth Circuit and could not possibly be addressed by this Court at any point.[26]

Petitioners are eager to address the merits of this case in light of Supreme Court precedent and personal jurisdiction jurisprudence of the courts of appeal. However, Petitioners recognize that the

23 Resp't's Br., pp. 7-8.
24 SUP. CT. R. 15.
25 Resp't's Br., pp. 16-21.
26 *Id.* at 20-21.

petition for a writ of certiorari is not the appropriate time or place for their merits-based arguments. Accordingly, Petitioners decline to respond to the merits-based arguments contained in Section II of the Respondent's brief in opposition because the arguments are not relevant to the petition before the Court.

Nevertheless, Petitioners take this opportunity to highlight how the Respondent's argument in Section II reveals the crux of Petitioners' argument that personal jurisdiction jurisprudence is outdated and convoluted in light of the recent developments to interstate electronic communications. Respondent's argument advances Petitioners' position by demonstrating that throughout her ten-year relationship with the Petitioners, Grenemyer was able to make over one million dollars ($1,000,000.00) in sales for Plaintiffs' Texas based company throughout the United States using electronic communications all from her limited geographic territory.

Interstate commerce has significantly evolved since the door-to-door-sales of *International Shoe Co. v. Washington*[27]—it is time that personal jurisdiction jurisprudence followed suit and recognized that the internet and other electronic communications have made it easier to meet due process requirements.

The Second Circuit has recently recognized the need for an "update" to personal jurisdiction jurisprudence "in the age of internet commerce."[28]

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27 326 U.S. 310 (1945).

28 *Chloe v. Queen Bee of Beverly Hills, LLC*, ___ F.3d ___, No. 09 3361-cv, 2010 U.S. App. LEXIS 16192 at *12 (Aug. 5, 2010).

Holding that "the single act of an out-of-state defendant employee shipping an item into New York, combined with his employer's extensive business activity involving New York, gives rise to personal jurisdiction over the employee."[29] Under Second Circuit law, personal jurisdiction exists whether or not the employee personally shipped the bag and whether or not the bag shipped was a counterfeit.[30] This August 2010, Second Circuit case casts even more doubt on the jurisprudence in other circuits limiting the exercise of personal jurisdiction even in cases where substantial contacts exist.

IV. The Supreme Court's Denial of Certiorari is not Precedential

"[I]t is axiomatic that denials of writs of certiorari have no precedential value."[31] Traditionally denied without any commentary, it is impossible to know the reasons for any particular denial of certiorari. Were one to speculate, any number of reasons could be the basis for a denial of a writ of certiorari. These reasons include "[n]arrowly technical reasons," such as a review sought to late or a premature appeal and "considerations of judicial policy," such as a cloudy record or an issue that is not yet ripe.[32] Indeed, "all that a denial of a petition for a writ of certiorari means is

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29 *Id.*

30 *Id.* at *14, *15 n.3.

31 *Stebbing v. Md.*, 469 U.S. 900, 907 (1984). *See Also Teague v. Lane*, 489 U.S. 288, 296 (1989)(quoting *Md. v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917 (1950))("The 'variety of considerations [that] underlie denials of the writ[]' counsels against according denials of certiorari any precedential value.").

32 *Baltimore Radio Show*, 338 U.S. at 917-18.

that fewer than four members of the Court thought that it should be granted."[23]

However, despite clear precedent precluding such an argument, Respondent attempts to ride on the coat-tails of other cases in which the Supreme Court has denied certiorari. It is impossible to speculate as to the Court's reasons for denying certiorari in prior cases. Moreover, given the judicial doctrine of ripeness, it is likely that most cases where certiorari is granted are preceded by a long line of similar cases where certiorari was denied.

V. Jurisdictional Discovery is an Important Tool when Jurisdictional Facts are Disputed

Ignoring the important constitutional implications, Respondent's brief implies that the lower court's denial of jurisdictional discovery and the Fifth Circuit's implicit refusal to review the issue is not a worthy of this Court's review because it was a "discretionary decision." Respondent's dismissive approach ignores Supreme Court precedent for reviewing discretionary lower court decisions for abuse of discretion, recent circuit court cases addressing the importance of jurisdictional discovery, and the implications which stem from a court's refusal to allow jurisdictional discovery where jurisdictional facts are in dispute.

The application of an abuse of discretion standard does not make a lower court's holding immune from review. Thus, while it is important to grant

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23 *Id.* at 919.

deference to the discretionary rulings of a lower court, such rulings "are not left to a trial court's 'inclination,' they are left to the court's 'judgment.'"[34] "[A] district court's exercise of discretion is to be judged [by] the 'interest of sound judicial administration.'"[35] Accordingly, the discretionary nature of a lower court's decision "hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review."[36]

Applying the above standards, the Supreme Court has not shied from reviewing and reversing the decisions of lower courts for abuse of discretion. For example, in the last term, this Court found and reversed an abuse of discretion in *Monsanto Company v. Geertson Seed Farms*.[37] Many other cases before the Court have also led to reversal under the abuse of discretion standard.[38] Thus, Respondent's suggestion that a "discretionary decision . . . does not present a compelling reason to warrant this Court's review" is not supported.

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34 *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975)(quoting *United States v. Burr*, 25 F. Cas. 30, 35, F. Cas. No. 14692d (No. 14692d) (CC Va. 1807) (Marshall, C.J.)).

35 *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10 (1980) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437 (1956)).

36 *Albermarle*, 422 U.S. at 416.

37 130 S. Ct. 2743, 177 L. Ed. 2d 461, 481 (U.S. 2010).

38 *See, e.g., Dada v. Mukasey*, 554 U.S. 1, 128 S. Ct. 2307, 2320 (2008); *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 382 (U.S. 2008); *Ebay v. Mercexchange, LLC*, 547 U.S. 388, 394 (2006); *Foman v. Davis*, 371 U.S. 178, 182 (1962) (holding that the "outright refusal to grant . . . leave [to amend a complaint] without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of that discretion . . . .").

The availability of jurisdictional discovery is an important constitutional issue. Whether or not a plaintiff is afforded the opportunity to discover jurisdictional facts before dismissal can be vital to the outcome of the jurisdictional question. In the instant case, the district court denied limited jurisdictional discovery[39] despite factual disputes which might have led to a different result.[40] Indeed, in noting a factual dispute, the magistrate report concluded that the district court did "not have to accept the McFadins' allegation that Grenemyer caused tortious injury in Texas as true where contradicted by Grenemyer's evidence."[41] Thus, the district court expressly recognized a factual dispute as to jurisdictional issues while at the same time denying jurisdictional discovery.

Nevertheless, the Fifth Circuit did not deign itself to rule on the issue of jurisdictional discovery despite briefing by the parties.[42] The Fifth Circuit's decision to ignore the properly preserved issue of jurisdictional discovery shows a disregard for the importance of the issue. However, other courts of appeal have recently addressed the importance of jurisdictional discovery—in some cases reversing district courts for abuse of discretion.[43] Accordingly,

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39 App. 23a.

40 App. 39a.

41 App. 39a.

42 *See McFadin*, 587 F.3d 753 (App. 1a) (containing no mention of jurisdictional discovery).

43 *See Patent Rights Prot. Group, LLC v. Video Gaming Tech., Inc.*, 603 F.3d 1364, 1372 (Fed. Cir. 2010)(finding that the "denial of [the plaintiff's] request for jurisdictional discovery resulted in actual and substantial prejudice to [the plaintiff]—premature dismissal of [the plaintiff's] suit—and therefore constituted an abuse of discretion"); *Pretka v. Kolter City Plaza II*, 608 F.3d 744

Petitioners pray this Court grant certiorari to set forth a clear standard as to the availability of jurisdictional discovery to resolve disputed jurisdictional facts.

CONCLUSION

For the reasons explained in this Reply and in their Petition for Writ of Certiorari, Petitioners pray this Court grant certiorari to review the holding of the Fifth Circuit. This case demonstrates how technology has evolved such that substantial electronic interstate commerce now takes place without leaving your home office or home. Engaging in interstate commerce relying solely on electronic communications such telephone, fax, teleconferencing and internet has become typical. The barriers to entry and burden of doing business nationwide have been radically reduced and the personal jurisdiction requirement of due process is easier to meet. This case provides a vehicle by which this Court can clarify issues of personal jurisdiction in light of the substantial developments in technology in the twenty-years since the Supreme Court has last issued a substantive ruling regarding personal jurisdiction and due process under the Constitution.

Respectfully submitted,

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(11th Cir. 2010)(Pryor, Concurring); *Twentieth Century Fox Int'l Corp. v. Scriba*, No. 08 56735, 2010 U.S. App. LEXIS 12797, at *4 *6 (9th Cir. June 22, 2010)(requiring "a more full and satisfactory showing of the facts . . . before the district court can adequately determine whether personal jurisdiction" exists").

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